

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

In the Matter of:

Determination of Royalty Rates and Terms for
Transmission of Sound Recordings by Satellite
Radio and “Preexisting” Subscription Services
(SDARS III)

Docket No. 16-CRB-0001 SR/PSSR
(2018-2022) (Remand)

SOUNDEXCHANGE, INC.’S OPENING BRIEF ON REMAND

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Pursuant to 37 C.F.R. § 351.15 and the Copyright Royalty Judges’ December 1, 2020 Order Regarding Proceedings on Remand, SoundExchange, Inc. (“SoundExchange”) submits this brief concerning the remaining issues in this proceeding. As discussed herein, (1) Music Choice’s current internet transmissions are not within the scope of its 1998 offerings, and hence, Music Choice is not entitled to pay for those transmissions under the rates and terms for a preexisting subscription service (“PSS”), and (2) the Judges should reaffirm their decision to amend the PSS audit provision, 37 C.F.R. § 382.7(d), to include a scope limitation on the effect of defensive audits.

I. INTRODUCTION

To determine whether Music Choice may pay for its subscription internet transmissions at a PSS rate set under the grandfathered Section 801(b)(1) rate standard, the D.C. Circuit has tasked the Judges with a remarkably easy undertaking: to determine whether Music Choice’s internet service today (including its mobile applications and internet-exclusive channels) falls within the “precise scope” of the service it offered in 1998. *Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 427-28 (D.C. Cir. 2020). As the Judges have previously held, the answer is a resounding no.

Both the documentary evidence and the sworn testimony of Music Choice’s CEO, David Del Beccaro, belie the claim that Music Choice’s current internet service is within the scope of its 1998 service. Mr. Del Beccaro testified in *Web I* that Music Choice first offered subscription service over the internet on April 26, 2000 – almost two years after the critical 1998 cut-off date – and archived versions of Music Choice’s embryonic website from the late 1990s confirm as much. Only now, 20 years later in the context of this litigation, do Music Choice and Mr. Del Beccaro try to rewrite that history with self-serving testimony about factual details that Mr. Del Beccaro admitted at his deposition he does not remember clearly. Rather than seeking to preserve its pre-

1998 investments, Music Choice seeks to impermissibly expand the advantage it holds over other webcasters by paying for non-PSS-eligible transmissions at PSS rates.¹

Additionally, the D.C. Circuit opinion requires the Judges to provide additional justification for their decision regarding the PSS audit provision. The Judges amended 37 C.F.R. § 382.7(d) to make clear that defensive audits conducted by a PSS “shall serve as an acceptable verification procedure for all parties *with respect to the information that is within the scope of the audit.*” *Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III)* (“Determination”), 83 Fed. Reg. 65,210, 65,268 (Dec. 19, 2018) (emphasis added). Justifications for this amendment are abundant, and the Judges should re-promulgate the regulation as written.

II. PROCEDURAL HISTORY

In 2016 and 2017, the Judges presided over a proceeding that set statutory royalty rates and terms for preexisting subscription services for 2018 to 2022.² *See Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services*, Docket 16-CRB-0001 SR/PSSR (the “*SDARS III* proceeding” or “underlying proceeding”). Music Choice – one of the two PSS entities whose transmissions can qualify for a preferential grandfathered rate relative to its competitors – actively participated in

¹ A bit of historical context highlights the implausibility of Music Choice’s claim: 1998 was years before internet-connected phones existed and a decade before the Apple Store sold its first app. *See The App Store Turns 10*, Apple (July 5, 2018), <https://apple.co/3hBPtsT>. Facebook, Twitter, YouTube, Pandora and Spotify had not yet been founded. Christopher McFadden, *A Chronological History of Social Media*, Interesting Eng’g (July 2, 2020), <https://bit.ly/3dwXQoi>; Craig Grannell, *A History of Music Streaming*, Dynaudio (May 16, 2018), <https://bit.ly/3w53KTN>. Amazon was primarily known as a mail order bookseller. Chaim Gartenberg, *Bezos’ Amazon: From Bookstore to Backbone of the Internet*, Verge (Feb. 3, 2021), <https://bit.ly/2UgnVAV>. And, in 1998, only roughly one in four U.S. of households had access to the internet. Eric C. Newberger, *Home Computers and Internet Usage in the United States: August 2000*, U.S. Census Bureau (Sep. 2001), <https://bit.ly/3jvw8vF>. It comes as no surprise that, in a technological landscape populated by videotapes, flip phones, and screeching modems, Music Choice could not and did not offer “precisely” the same service it does today.

² The proceeding also set rates and terms applicable to SDARS (Sirius XM).

this proceeding.³ The proceeding involved reams of written argument, and culminated in a month-long trial with dozens of witnesses.

In preparing their Final Determination, the Copyright Royalty Judges referred two novel legal questions to the Register of Copyrights. 17 U.S.C. § 802(f)(1)(B). Specifically, the Judges asked the Register to provide guidance on the following questions:

1. Are a preexisting subscription service's transmissions of multiple, unique channels of music that are accessible through that entity's website and through a mobile application "subscription transmissions by preexisting subscription services" for which the Judges are required to determine rates and terms of royalty payments under Section 114(f)(1)(A) of the Copyright Act?
2. If yes, what conditions, if any, must the PSS meet with regard to streaming channels to qualify for a license under Section 114(f)(1)(A)? For example, must the streamed stations be identical to counterpart stations made available through cable television? Is there a limitation on the number of channels that the PSS may stream? Is there a limitation on the number or type of customers that may access the website or the mobile application?

Scope of Preexisting Subscription Services ("Register's Decision"), 82 Fed. Reg. 59,652, 59,654 (Dec. 15, 2017).

The Register first held as a matter of law that internet transmissions are not an "existing service offering" that is unconditionally entitled to a rate set under the grandfathered Section 801(b)(1) standard. 82 Fed. Reg. at 59,657-58. She found that the relevant statutory text and legislative history established that Congress considered PSS to be limited to services offered via cable and/or satellite, not the internet, regardless whether a PSS provider may have made some internet transmissions before July 31, 1998. *Id.* The Register then considered whether internet

³ In *SoundExchange, Inc. v. Muzak LLC*, 854 F.3d 713 (D.C. Cir. 2017), the D.C. Circuit held that the term "service" in "preexisting subscription service" refers both to the business entity making the transmission and the program offering. 854 F.3d at 719. Accordingly, PSS entities like Music Choice "may (and do, subject to an appropriate royalty rate) provide services outside the scope of the PSS license (e.g., [I]nternet-based and mobile application-based services that are consumed outside the home)." Determination, 83 Fed. Reg. at 65,220.

transmissions by a PSS could constitute an “expanded service offering” under 17 U.S.C. § 114(d)(2)(C). *Id.* The Register’s opinion articulated six factors to be considered in determining whether transmissions made by a PSS provider in a different transmission medium from that used in 1998 were eligible for PSS rates pursuant to this provision. *Id.* at 59,658-59. Those factors included “[w]hether the service offering is consumed in a similar manner” as the 1998 service and “[w]hether and to what degree the service offering relates to the same pre-July 31, 1998 investments that Congress sought to protect.” *Id.*

Informed by the Register’s legal ruling, the Judges issued their Final Determination. In it, the Judges held that Music Choice was not unconditionally entitled to a rate set under the grandfathered Section 801(b)(1) standard (an “unconditional PSS Rate”) for its internet transmissions. Determination, 83 Fed. Reg. at 65,227. The Judges further applied the Register’s six factor test and concluded that Music Choice was not conditionally entitled to a rate set under the grandfathered Section 801(b)(1) standard (a “conditional PSS Rate”) for its internet transmissions available outside the home. *Id.* The Judges reaffirmed that conclusion in denying Music Choice’s motion for rehearing. Order Granting in Part and Denying in Part Sirius XM’s Motion for Rehearing and Denying Music Choice’s Motion for Rehearing (“Rehearing Order”), Docket No. 2431, at 12-16 (Apr. 18, 2018). In so holding, the Judges emphasized that Music Choice’s internet transmissions today are available outside the home and on mobile devices, and thus are substantially different from any internet transmissions Music Choice may have been making in 1998. *Id.* at 13-15.

Music Choice appealed from the Copyright Royalty Judges’ Final Determination. Music Choice challenged the Final Determination’s finding (guided by the Register’s opinion) that Music Choice’s internet transmissions accessible outside the home were not eligible to be considered a

PSS. Music Choice also appealed part of the Final Determination regarding 37 C.F.R. § 382.7(d), the audit provision applicable to PSS. *Music Choice*, 970 F.3d at 420. The challenged provision was an amendment to § 382.7(d), which specified that independent audits conducted by a PSS “shall serve as an acceptable verification procedure for all parties *with respect to the information that is within the scope of the audit.*” 83 Fed. Reg. at 65,268 (emphasis added).⁴

On August 18, 2020, the D.C. Circuit issued an order remanding both issues. The Court’s opinion did not suggest that the Judges’ ultimate conclusion on either issue was incorrect. Rather, it requires the Judges to provide additional analysis and reasoning specific to Music Choice. First, the Court held that PSS eligibility of internet transmissions made by PSS providers could not be determined *on a categorical basis*, but instead must be considered in light of the facts of the provider’s particular offerings. *Music Choice*, 970 F.3d at 427-28. The Court thus directed the Judges to “determine the precise scope of Music Choice’s service offering as it actually existed on July 31, 1998” and to “assess whether Music Choice’s current internet service offerings, including its mobile application and internet-exclusive channels, are a part of the service offering Music Choice provided on July 31, 1998.” *Id.*; *see also id.* at 420 (stating that the Judges retain the “discretion to determine whether parts of Music Choice’s current service offering, which includes mobile applications and internet-exclusive channels, should be excluded from the grandfathered rate”); *id.* at 427 n.9 (declining to review the Register’s six-factor test).

The D.C. Circuit remanded the audit provision on the ground that the Judges had not adequately explained their decision to adopt the amended audit provision. *Id.* at 428-30. The court

⁴ Prior to this amendment, the PSS audit provision omitted the italicized text. *See* 37 C.F.R. § 382.7(e) (2013). In other words, the new regulation – which conforms the PSS audit provision to the audit provisions applicable to other types of services – simply confirmed the unremarkable proposition that an audit of narrow scope undertaken by a licensee could not be used to foreclose SoundExchange from initiating an audit of information outside the audit’s scope.

observed that the Judges could “justify [their] change in position” on remand by providing “a reasoned analysis” for why they adopted the new audit provision. *Id.* at 429-30 (internal quotation marks omitted). Although the appellate decision demands further analysis, it also makes clear that the Judges need not alter the regulatory language that they adopted in the original Determination. *Id.* at 430.

III. ARGUMENT

Although the D.C. Circuit has commanded the Judges to provide further explication of their original decisions concerning the remaining issues in this proceeding, nothing in the Court’s opinion should alter the conclusions the Judges reached in their Final Determination.

The Judges “have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms.” 17 U.S.C. § 802(f)(1)(A). The Judges must make decisions based on the record before them, and those decisions cannot be overturned unless they are “arbitrary, capricious, contrary to law, or not supported by substantial evidence.” *Music Choice*, 970 F.3d at 423 (quotation marks omitted); *see also id.* at 429 (citing *Intercollegiate Broad. Sys., Inc. v. CRB*, 574 F.3d 748, 767 (D.C. Cir. 2009)). The Judges may rely on “[a]ll evidence that is relevant and not unduly repetitious or privileged” and “[h]earsay may be admitted to the extent deemed appropriate.” 37 C.F.R. § 351.10(a).

Now, as before, the Judges should find that (1) Music Choice’s internet transmissions are beyond the scope of its 1998 offering and therefor ineligible for a PSS rate set under the grandfathered Section 801(b)(1) standard, and (2) the amendment to the audit provision announced in the Final Determination remains proper.

A. Music Choice’s Internet Transmissions Do Not Qualify for a PSS Rate

On remand, the Judges must examine whether Music Choice’s current internet transmissions are part of the same service as transmissions it was making on or before July 31,

1998. *Music Choice*, 970 F.3d at 425. To do so, they must determine “the precise scope of Music Choice’s service offering as it actually existed on July 31, 1998.” *Id.* at 427-28. Only transmissions that “can fairly be characterized as included in the service offering Music Choice provided on July 31, 1998” are entitled to the grandfathered PSS royalty rate. *Id.* at 425; 17 U.S.C. § 114(j)(11) (defining “preexisting subscription service” as “a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998”).

The D.C. Circuit’s opinion addresses both what it calls an “unconditional grandfathered rate” pursuant to § 114(d)(2)(B), and a “conditional grandfathered rate” pursuant to § 114(d)(2)(C). To qualify for an “unconditional grandfathered rate,” a preexisting service’s “subscription transmission” must be made “in the same transmission medium used by such service on July 31, 1998.” *Id.* at 421 (quoting 17 U.S.C. § 114(d)(2)(B)). “Medium,” for purposes of this analysis, refers to “the basic telecommunications service through which that offering is being delivered to the user.” Register’s Decision, 82 Fed. Reg. at 59,659. If the Judges find that a transmission is made by a PSS in a different transmission medium, it must assess whether the transmissions might be eligible to pay royalties subject to a “conditional grandfathered rate,” 17 U.S.C. § 114(d)(2)(C). 970 F.3d at 427 & n.9. Among the aspects of Music Choice’s service the Court instructed the Judges to consider are whether Music Choice made internet transmissions “available outside the home” prior to July 31, 1998, and whether “internet-exclusive channels and smartphone applications” were part of Music Choice’s service offering prior to July 31, 1998. *Id.* at 428.

The Judges can easily dispose of these questions. The evidence shows that the subscription internet transmissions that Music Choice now seeks to pay for at a PSS rate were *not* within the scope of the company's service offering as it actually existed on July 31, 1998. Music Choice's website and documents as of the relevant date indicate that its service did not include such transmissions, and Music Choice's CEO testified contemporaneously that Music Choice did not offer subscription internet transmissions until two years later. Because Music Choice does not meet the requirements of either § 114(d)(2)(B) or 114(d)(2)(C), it cannot pay for its internet transmissions at a rate set under the grandfathered Section 801(b)(1) standard.

1. Music Choice's Internet Transmissions Do Not Qualify for an "Unconditional" PSS Rate Under § 114(d)(2)(B)

Documentary evidence and sworn testimony from the company's CEO from the relevant time period both confirm that the internet transmissions that Music Choice makes today cannot "fairly be characterized as included in the service offering Music Choice provided on July 31, 1998," and therefore are not eligible for an unconditional PSS rate. *See Music Choice*, 970 F.3d at 425; *see* 17 U.S.C. § 114(d)(2)(B). The D.C. Circuit held that although internet transmissions may not be excluded from PSS eligibility on a categorical basis, "the Board retains discretion in determining the extent to which Music Choice's current internet offerings can fairly be characterized as included in the service offering Music Choice provided on July 31, 1998." 970 F.3d at 425. As they did in their Final Determination,⁵ the Judges should find that Music Choice's current internet transmissions are not within the scope of its pre-July 1998 offerings and do not qualify for a PSS rate pursuant to § 114(d)(2)(B).

⁵ The Judges reasserted this holding in their subsequent Order on Rehearing. Rehearing Order at 12-16.

a. Music Choice Made No Internet Transmissions Before July 31, 1998

Shortly after 1998, before the passage of time that can cause memories to fade, Music Choice’s CEO David Del Beccaro testified under oath in the *Web I* rate-setting proceeding that Music Choice did not offer its service over the internet until *after* July 31, 1998. *See* Ex. R, Testimony of David J. Del Beccaro 5, *In re Rate Setting for the Digital Performance Right in Sound Recordings and Ephemeral Recordings (Web I)*, No. 2000-9 CARP DTRA 1 & 2 (Apr. 11, 2001). In that sworn testimony, Mr. Del Beccaro testified unequivocally that “[REDACTED]” *Id.* When Music Choice did begin delivery over the internet, its offering looked drastically different from the webcasting service Music Choice provides today. According to Mr. Del Beccaro, [REDACTED] [REDACTED] [REDACTED]. Mr. Del Beccaro further testified that [REDACTED] [REDACTED].

Documents created during the relevant period corroborate Mr. Del Beccaro's *Web I* testimony. An archived version of Music Choice's website accessible via the Internet Archive's Wayback Machine shows that Music Choice did not offer streaming music on its website, nor did it tout its streaming capabilities on or before July 31, 1998.⁶ *See* Exs. C-F; Ex. B, Declaration of Andrew B. Cherry (authenticating Exhibits C-F). The Frequently Asked Questions ("FAQ") page,

⁶ The Internet Archive is an independent nonprofit organization, and courts regularly accept the Wayback Machine as a reliable indicator of websites at particular moments in the past. *Klayman v. Jud. Watch, Inc.*, 299 F. Supp. 3d 141, 147 (D.D.C. 2018) (finding Internet Archive version of opposing parties website could be admitted in evidence with testimony about the viewing and screen capture process); *United States ex rel. Oliver v. Philip Morris USA, Inc.*, 101 F. Supp. 3d 111, 122-23 (D.D.C. 2015) (affirming authenticity of Internet Archive evidence), *aff'd*, 826 F.3d 466 (D.C. Cir. 2016); *United States v. Kieffer*, 681 F.3d 1143, 1153 n.3 (10th Cir. 2012) (same); *United States v. Bansal*, 663 F.3d 634, 667–68 (3d Cir. 2011) (same).

which appeared on the Music Choice site from the 1996 to 2000, describes Music Choice as “a CD quality music service that comes into your home or business via cable or DIRECTV.” Ex. C at SXREMAND000000316. A more detailed explanation of how Music Choice’s service was transmitted to customers appears on the same webpage:

MUSIC CHOICE originates from the MUSIC CHOICE uplink facility in New York City. The pure digital signal is transmitted via satellite to cable operators, which is then distributed via the cable lines to the consumer.

After receiving the signal, subscribers (residential and commercial) receive digital tuners which are plugged into their stereo systems.

MUSIC CHOICE is also available to consumers via DIRECTV, a direct broadcast satellite service serving North America.

Id. This explanation comports with Mr. Del Beccaro’s testimony in this remand proceeding about the delivery mechanism Music Choice used at that time. Ex. G, Deposition of David Del Beccaro (“Del Beccaro Dep.”) Tr. 61:3-62:7, 66:22-67:16 ([REDACTED] [REDACTED] [REDACTED]); Ex. H at SXREMAND000000327 (providing further detail about technical capabilities).⁷

The evidence does not indicate that Music Choice was offering its consumers internet service as we understand it today. *See* Ex. E at SXREMAND000000325; Ex. F. at SXREMAND000000321 (archived version of pages from Music Choice’s website from July 5, 1998 show no music streaming option and do not identify streaming on Music Choice’s website as a method to “get” Music Choice).

⁷ An article from December 1997 from *Cable & Satellite Europe* describes a similar operation process for Music Choice’s transmission of its service to its European cable distributors. *See* Ex. H at SXREMAND000000327 (cable distributor receives a “feed of the Music Choice service by satellite,” then converts the audio channels into an “MPEG Layer 3 audio stream using Audioactive encoders”; cable subscribers access channels by using a Plug-In device, their personal computers and a cable modem system).

b. The One Pre-1998 Broadband Offering by A Music Choice Distributor Was Extremely Limited And Did Not Involve Internet Transmissions

Music Choice's references to a pre-July 1998 internet service (and in particular a 1996 service) appear to relate to a limited offering provided on a trial basis to users of Continental Cablevision's proprietary broadband network in Jacksonville, Florida. Ex. H at SXREMAND000000327 (referring to Florida offering as a "trial" and identifying no other U.S. market in which such an offering was available). The archived version of Music Choice's website includes a press release that announced that this broadband service, Highway1, was to launch on September 23, 1996 in Jacksonville. *See* Ex. D at SXREMAND000000313 ("Music Choice to Launch on Continental Cablevision's High-Speed Internet Service in Jacksonville, FL"); *see also* Ex. C at SXREMAND000000316 (FAQ stating that "MUSIC CHOICE is also available as part of Continental Cablevision's High Speed Internet Service in Jacksonville, Florida" and identifying no other markets in which Music Choice was available over the internet). The press release states that Continental Cablevision's Jacksonville customers who purchased Highway1 would receive access to 10 Music Choice audio channels. Ex. D at SXREMAND000000313 ("By including MUSIC CHOICE as part of the Continental service offering, consumers will have the ability to surf the net while listening to music."). Highway1 did not offer any internet-exclusive channels. *Id.* (same 10 channels were available to Continental's television subscribers); Del Beccaro Dep. Tr. 102:7-11 [REDACTED]. There is no evidence of how many Jacksonville customers, if any, actually purchased Highway1 or accessed Music Choice through it. *See* Del Beccaro Dep. Tr. 92:25-93:12.

This offering did not involve internet transmissions by Music Choice, or indeed any transmission of Music Choice channels over the internet.⁸ Music Choice transmitted its audio channels to Continental Cablevision (and other cable companies) by satellite. Continental Cablevision then retransmitted the Music Choice programming to the subscribers to its Highway1 broadband service only over its own local broadband network.⁹ Del Beccaro Dep. Tr. 121:19-122:21 [REDACTED]. A Continental Cablevision subscriber would need a cable modem and digital tuner to convert the Continental Cablevision signal into an analog signal that could play on a connected device. Ex. C at SXREMAND000000316-SXREMAND000000317; *see also* Del Beccaro Dep. Tr. 26:7-17, 29:19-31:1 [REDACTED]. This indirect and primitive means of transmission bears no resemblance to how Music Choice provides internet service today. *See, e.g.*, Del Beccaro Dep. Tr. 150:21-24 [REDACTED]; [REDACTED]; *id.* at 150:25-151:17 [REDACTED]; [REDACTED]; *id.* at 157:21-24 [REDACTED]; [REDACTED]; *Add Your Music Choice Profile*, Music Choice, musicchoice.com/help-center/music-choice/Add-Your-Profile/ (last visited June 29, 2021) (explaining that consumers can access Music Choice on virtually any mobile device, virtually anywhere they can connect to the internet, so long as they log in once every 30 days while connected to their home network); *Where to Find Music Choice*,

⁸ What is commonly referred to as the “internet” is a series of interconnected networks that each have their own owner. *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 690 (D.C. Cir. 2016). Thus, the internet is distinct from any one individual privately-owned network. While a private network might be connected to the internet, transmissions that are exclusively limited to one private network cannot meaningfully be said to be internet transmissions.

⁹ Music Choice’s interrogatory responses acknowledge that any internet transmissions it made prior to July 31, 1998 were through cable providers. Ex. I at 10-11.

Music Choice, musicchoice.com (last visited June 29, 2021) (“Music Choice is available on your TV, Web App, and on the go with the Music Choice app for iOS & Android.”); Ex. J at Music Choice_Remand_0014675 (showing that the Music Choice app allows consumers to log in through Google and Facebook).

Although Music Choice’s interrogatory responses assert that a handful of other cable providers also transmitted the company’s service to their customers prior to July 31, 1998, the evidence does not bear out this claim.¹⁰ Music Choice has produced no documents that show which other providers offered its internet transmissions at that time, and SoundExchange is not aware of any. While there are some vague references to planned expansion of the service offering beyond Jacksonville, Music Choice has produced no evidence of when this planned rollout actually occurred or to which distributors it was provided. In any case, whatever limited broadband service Music Choice may have been trying to develop in July 1998, it was drastically different than its subscription internet service today.

Mr. Del Beccaro’s deposition in connection with this remand proceeding does not improve Music Choice’s position. At his deposition, Mr. Del Beccaro could not identify any other market in which Continental Cablevision’s Highway1 broadband service was offered, nor could he identify any other Music Choice distributor that offered a similar internet service

¹⁰ Ex. I at 10 (Music Choice’s Response to SoundExchange’s interrogatories claiming that Music Choice in 1998 “was actively transmitting the internet service through several Distributors, including Continental, Time Warner, Adelphia, MediaOne, Comcast, and Cox”). It is unclear from Music Choice’s interrogatory response if it is referring to MediaOne and Continental as different distributors. Sometime in the late 1990s, Continental was acquired by U.S. West. At that time, Continental was renamed to MediaOne. U.S. West, Inc. (Form 8-K) (Oct. 7, 1996), <https://www.sec.gov/Archives/edgar/data/732718/0000732718-96-000035.txt> (describing anticipated November 1996 merger between U.S. West and Continental Cablevision); *About Continental Cablevision*, The Continental Cablevision Story, <https://continentalstory.com/about-continental-cablevision/> (last visited June 29, 2021) (noting that Continental Cablevision was renamed to MediaOne after the purchase by US WEST).

offering on or before July 31, 1998.¹¹ Del. Beccaro Dep. Tr. 77:21-79:9; *id.* at 99:18-25 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Further, Mr. Del Beccaro also testified that no one else at Music Choice would be able to supply this information, and that he was unaware of any documents that could do so. Del. Beccaro Dep. Tr. 166:22-167:6. In light of all of this, Music Choice’s contrary, self-serving statements, should be afforded no weight. *See Mokhtar v. Kerry*, 83 F. Supp. 3d 49, 74 (D.D.C. 2015), *aff’d*, No. 15-5137, 2015 WL 9309960 (D.C. Cir. Dec. 4, 2015). “This is especially true when,” as here, “these statements are unsubstantiated by any non-self-serving evidence and, . . . are rendered unreasonable given other undisputed evidence in the record.” *Id.*; *cf. Competitive Telecomms. Ass’n v. FCC*, 998 F.2d 1058, 1063 (D.C. Cir. 1993) (refusing to “second-guess the agency’s decision weighing” self-serving testimony); *Huthnance v. District of Columbia*, 722 F.3d 371 (D.C. Cir. 2013) (adverse inference may be drawn where a party that is in the best position to proffer evidence fails to do so). This failure is further punctuated by the fact that the grandfathered rates that Music Choice seeks are a narrow exception to the rates applicable to virtually all other webcasters. *See SoundExchange, Inc. v. Muzak, LLC*, 322 F. Supp. 3d 72, 74 (D.D.C. 2018) (grandfathered PSS rates are “an exception,” not the general rule).

¹¹ Throughout his deposition, Mr. Del Beccaro testified that he did not know or could not recall other specifics. *See, e.g.*, Del Beccaro Dep. Tr. 49:3-4 [REDACTED]

[REDACTED]

c. Music Choice's Current Internet Offerings Are Far Outside the Scope of Its Pre-1998 Offerings

The internet transmissions that Music Choice makes today cannot “fairly be characterized as included in the service offering Music Choice provided on July 31, 1998,” and therefore are not eligible for an unconditional PSS rate. *See Music Choice*, 970 F.3d at 425.

As an initial matter, despite how the limited pre-appeal record appeared to the Court, prior to July 31, 1998, Music Choice was not actually transmitting in the internet medium as it is today. As Mr. Del Beccaro explained in contemporaneous, sworn testimony and as documentary evidence makes clear, in 1998, Music Choice's commercial service was delivered by cable and satellite. Music Choice's service was not available over the internet at all until 1999, and was not available over the internet on a subscription basis until 2000. Music Choice's only apparent claim to pre-1998 internet transmission is based on a limited trial offering provided by Continental Cablevision. However, that service was provided by Continental Cablevision by retransmitting a few channels from Music Choice's satellite signal, and it was not actually delivered to subscribers over the internet, but exclusively over Continental Cablevision's local broadband network. As the Register explained, minor advances in technology alone – like the change from coaxial cables to fiber optic – do not constitute a “new transmission medium.” Register's Decision, 82 Fed. Reg. at 59,659-60. However, that is not the issue here. Music Choice's programming simply did not traverse the internet in 1998.

Moreover, Music Choice's current internet service is nothing like the limited offering available to Continental Cablevision subscribers in 1998 (or even Music Choice's own offerings in 1999 and 2000). In 1998, Music Choice was not available on any mobile device, was not available outside the home, and was not available over wireless internet. Even if Music Choice had been making internet transmissions in 1998 (and it was not), these differences place its service

far outside the “precise scope” of its 1998 offering and thus disqualify Music Choice from paying for its internet transmissions at the unconditional PSS rate. *Music Choice*, 970 F.3d at 427-28.

In 1998:

- **Music Choice did not include internet-exclusive channels:** The 1998 offerings of Music Choice and Continental Cablevision did not include any internet-only channels. Del Beccaro Dep. Tr. 102:7-11 [REDACTED]; Ex. D at SXREMAND000000313 (10 Highway1 provided were “existing” channels). By contrast, the Judges have found – based on Mr. Del Beccaro’s written direct testimony in the underlying proceeding – that Music choice now offers 25 internet-only channels in addition to the audio channels delivered to subscribers’ cable and satellite televisions. Determination, 83 Fed. Reg. at 65,227. *See Music Choice*, 970 F.3d at 420 (instructing Judges to assess whether Music Choice offered internet-exclusive channels in 1998); *see also* Determination, 83 Fed. Reg. at 65,212.
- **Music Choice was not available on smart phones:** In 1998, internet-connected smart phones were yet not available. It was not until 2007, for instance, that the first iPhone was sold. *See* Del Beccaro Dep. Tr. 22:12-14 [REDACTED]; Edward C. Baig, *Apple’s iPhone isn’t perfect, but it’s worthy of the hype*, USA Today (June 26, 2007), https://usatoday30.usatoday.com/tech/columnist/edwardbaig/2007-06-26-iphone-review_N.htm (iPhone could “view full Web pages” and “is the closest thing to the real-deal Internet that I’ve seen on a pocket-size device”). Of course, Music Choice’s current service is available for streaming on mobile phones. *See* Ex. K at Music Choice Remand 0011763 ([REDACTED]); *see also Music Choice*, 970 F.3d at 420 (instructing Judges to assess whether Music Choice was available on mobile applications in 1998).
- **Music Choice was not available through a mobile app:** In 1998, no Music Choice app existed for consumer use on mobile devices (nor did the other major music apps that are familiar today). Del Beccaro Dep. Tr. 116:2-9. Not surprisingly (since there were no smart phones), the Apple Store did not sell its first app until 2008—approximately a decade after the cut-off date for PSS eligibility. Christina Bonnington, *5 Years On, the App Store Has Forever Changed the Face of Software*, Wired (July 10, 2013), <https://www.wired.com/2013/07/five-years-of-the-app-store/> (when the iPhone first debuted in 2007, it had only a handful of Apple-built apps; the App Store did not launch until July 10, 2008); *see also* Determination, 83 Fed. Reg. at 65,212-13.
- **Music Choice was not available on any device outside the home:** Because Continental Cablevision subscribers accessing Music Choice through its limited broadband trial were tethered to its local network and their cable modems in 1998, those subscribers were unable to listen to Music Choice at work, in the car or on any device. *See* Del Beccaro. Tr. 126:24-127:12. The current service is accessible anywhere through a mobile app on a smartphone, tablet, or smart TV. *See Where to*

Find Music Choice, Music Choice, musicchoice.com (last visited June 29, 2021), musicchoice.com (“Music Choice is available on your TV, Web App, and on the go with the Music Choice app for iOS & Android.”).

- **Music Choice was not available over Wi-Fi:** Even at home, Continental Cablevision subscribers could not listen to Music Choice far from their cable modems, because wireless home networks were not available to consumers as they are today. *Who We Are*, Wi-Fi Alliance, <https://www.wi-fi.org/who-we-are/history> (last visited June 4, 2021) (Wi-Fi certified products first available in in 2000; term “Wi-Fi” coined the same year).

Mr. Del Beccaro, Music Choice’s only witness regarding its internet transmission in 1998, could not recall any facts that challenge these definitive differences (nor could he even identify any distributor through which Music Choice provided internet transmissions on or before July 31, 1998 other than the Jacksonville broadband offering described above). The documents Music Choice has produced do not show that the “precise scope” of its internet transmissions in 1998 was broader than described above. Because Music Choice’s internet service today is not transmitted in the same medium as in 1998, and is not within the “precise scope” of its 1998 service, Music Choice is not entitled to pay for its internet offerings at an unconditional PSS rate pursuant to § 114(d)(2)(B).

2. Music Choice’s Internet Transmissions Do Not Qualify for a “Conditional” PSS Rate Under § 114(d)(2)(C)

If the Judges find that Music Choice cannot pay for its internet transmissions at an unconditional PSS grandfathered rate (which they should), there is potentially a question of whether Music Choice’s internet transmissions are eligible for a “conditional” PSS rate pursuant to § 114(d)(2)(C). However, in their underlying Determination and Order on Rehearing, the Judges undertook exactly this analysis. Applying the Register’s six-factor test, the Judges determined that Music Choice’s internet transmissions must be excluded from the conditional grandfathered rate “to the extent they are available outside a subscriber’s residence,” such as through mobile applications. *Music Choice*, 970 F.3d at 422 (quoting Determination, 83 Fed. Reg.

at 65,227); *see* Determination, 83 Fed. Reg. at 65,227 (finding conditional rate unavailable to Music Choice); Rehearing Order at 12-16.

In remanding this issue, the D.C. Circuit did not question the Register’s six-factor test, nor did it give any indication that it doubted the Judges’ conclusion. *See Music Choice*, 970 F.3d at 427 n.9.¹² Nonetheless, the Court instructed the Judges to re-perform this analysis in light of the Court’s holding that internet transmissions may not be excluded from PSS eligibility on a categorical basis. *Id.* at 427-28. Although the Judges must now reconsider this question after they determine the “precise scope of Music Choice’s service offering as it actually existed on July 31, 1998,” there is no reason that this analysis should lead to a different conclusion.¹³ The Register’s test remains controlling as to the six-factor test to be applied, *see* 17 U.S.C. § 802(f)(1)(B)(i), and the Judges have already applied that test. Because the “precise scope” of Music Choice’s internet transmissions prior to July 31, 1998 was extremely limited, *see supra* §§ III.A.1.a-b, and did not include internet transmissions similar to those it makes today, the Judges’ prior reasoning still stands.

B. The Judges Should Reissue The Audit Provision, 37 C.F.R. § 382.7(d)

The D.C. Circuit also vacated the Judges’ amendment to the regulation that governs auditors’ verification of royalty payments, 37 C.F.R. § 382.7(d). *Music Choice*, 970 F.3d at 430. Although the Court’s decision requires the Judges to provide additional explanation of their

¹² The Court found, “Because we conclude that internet transmissions are not categorically excluded from the unconditional grandfathered rate, we need not consider Music Choice’s challenge to the Board’s application of the Register’s ‘non-exhaustive’ six-factor test under the conditional grandfathered rate.” *Music Choice*, 970 F.3d at 427 n.9.

¹³ The Court’s concern with this part of the Determination appears to arise from the possibility that – absent the categorical exclusion of internet transmissions from PSS eligibility – the Judges could have declined to exclude Music Choice’s specific internet transmissions from PSS eligibility. In this instance, however, those two paths do not diverge. Whether analyzed on a categorical basis (as the Register suggested) or under the individualized standard articulated by the Court, “Music Choice’s current internet service offerings, including its mobile application and internet-exclusive channels,” are not a part of the service offering Music Choice provided on July 31, 1998. *Music Choice*, 970 F.3d at 427.

reasoning regarding this amendment, it does not necessitate a different outcome. *See* 970 F.3d at 429 (acknowledging that the Judges may be able to justify their position).

At SoundExchange’s request, the Judges modified section 382.7(d) as follows:

The audit. The audit must be conducted during regular business hours by a Qualified Auditor who is not retained on a contingency fee basis and is identified in the notice. The auditor shall determine the accuracy of royalty payments or distributions, including whether the Payor made an underpayment or overpayment of royalties. An audit of books and records, including underlying paperwork, performed in the ordinary course of business according to generally accepted auditing standards by a Qualified Auditor, shall serve as an acceptable verification procedure for all parties *with respect to the information that is within the scope of the audit*.

37 C.F.R. § 382.7(d) (emphasis added).

The key change is the addition of the limiting language “with respect to the information that is within the scope of the [defensive] audit.” 37 C.F.R. § 382.7(d). This change makes clear that when a PSS licensee like Music Choice conducts a so-called defensive audit of its royalty payments, that audit is an adequate substitute for a SoundExchange audit *of the same scope*. *Cf. Music Choice*, 970 F.3d at 428 (“The Final Determination amends this regulation to provide that an independent audit will be determinative only as to the issues within the scope of the audit, thus potentially allowing other parties to conduct additional audits. 83 Fed. Reg. at 65,262, 65,268 (amending the provision so that independent audits “shall serve as an acceptable verification procedure for all parties with respect to the information *that is within the scope of the audit*”) (emphasis added).”).

Holding that this amendment was a substantive revision to the audit procedure rather than a clarification, the D.C. Circuit determined that a more fulsome discussion of the Judges’ reasoning was necessary as a procedural matter. 970 F.3d at 430 (vacating and “remand[ing] for the Board . . . to reconsider the audit definition and provide a reasoned explanation if the Board determines the revised definition is justified”). The Court did not question the substantive outcome.

There is ample justification for this amendment in the record of the underlying proceeding. *See* Proposed Findings of Fact and Conclusions of Law of SoundExchange, Inc. and Copyright Owner and Artist Participants (“SoundExchange PFoF”) ¶¶ SEPFF2288-SEPFF2305. The discussion below provides further explanation as to why the proposed regulations for PSS verification procedures are justified, including in response to questions raised by the D.C. Circuit.

First, adding the proposed language would harmonize the PSS regulations with those applicable to other categories of licensees. As the Judges noted in the underlying Determination, the proposed qualifying language is already included in the regulations relating to audits of both SDARS and webcasters.¹⁴ Determination, 83 Fed. Reg. 65,262. *Compare, e.g.*, SoundExchange Amended Proposed Rates and Terms, App. A at § 382.6(d) (filed June 14, 2017) *with* 37 C.F.R. § 380.6(d); *see also* 37 C.F.R. § 382.15(e) (effective for rate period 2013-17); 37 C.F.R. § 382.7 (former SDARS audit provision made applicable to both PSS and SDARS); 17 U.S.C. § 804(b)(3)(B)(ii) (SDARS rates and terms from initial determination applicable through 2027); *Portland Cement Ass’n v. E.P.A.*, 665 F.3d 177, 188 (D.C. Cir. 2011) (agencies must exercise rulemaking discretion in a “consistent . . . and evenhanded manner” (internal quotations omitted)). Consistency of terms across license categories has important substantive benefits, because it promotes efficient statutory license administration. SoundExchange PFoF ¶¶ SEPFF2168-SEPFF2173.

Second, allowing PSS entities to conduct narrow self-audits and avoid oversight by SoundExchange would frustrate the purpose of the audit provision as a whole. With no scope

¹⁴ Other record evidence provides further indication sweeping defensive audit provisions are not the industry standard. Neither Music Choice’s agreements with MVPDs nor the sound recording license agreement produced by record labels routinely permit licensees to avoid audits by conducting an audit of arbitrary scope on their own. *See* Ex. S at Music Choice_Remand_0009038; SoundExchange PFoF ¶ SEPFF2304 (collecting examples of sound recording license agreements).

limitation, a PSS entity would be able to obscure its methods of calculation and solicit defensive audits that are insufficient to identify underpayments of royalties. This is because a “defensive audit” may differ from an independent audit conducted at SoundExchange’s request in numerous ways, including the procedures employed, the level of rigor, the scope, and the degree of access to documents and information that auditors are afforded. Such differences can and do affect the extent to which an audit uncovers unpaid or underpaid royalties. The attached declaration of Lewis Stark, an independent auditor who has led the audits of Music Choice and Muzak on SoundExchange’s behalf, explains that the use of defensive audits has frustrated SoundExchange’s ability to assess the accuracy of royalty payments by Music Choice. Ex. A, Declaration of Lewis Stark, CPA (“Stark Decl.”) ¶¶ 7-11. Mr. Stark also explains how the process employed by Music Choice’s internal auditor, BDO, differs from the royalty verification procedures that he would have conducted for SoundExchange. *Id.* ¶¶ 2-3, 12-14. Among other things, the objective of an audit like the one BDO conducted is designed to assess whether or not the company’s royalty statements are fairly presented, in all material respects. Stark Decl. ¶ 2. This is different from the goal of an audit procedure designed to verify the accuracy of the calculations underlying a licensee’s royalty payments. Stark Decl. ¶ 3; *see also* SoundExchange PFoF ¶ SEPFF2303 (quoting Trial Ex. 48 at 23 n.10 (Bender WRT) and discussing differences between licensee’s financial statement audit and verification of a licensee’s royalty payments); *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, 81 Fed. Reg. 26,316, 26,401-02 (May 2, 2016) (concluding, with regard to webcasting regulations, that “A Service’s recent financial audit need not preclude a business audit that focuses on the Service’s royalty policies and procedures”).

Third, the resulting problems are more than theoretical. In the twenty-five years since the original *PSS I* CARP decision, it has become clear that licensees miscalculate or underpay their royalties frequently and significantly. Past royalty verification procedures conducted on behalf of SoundExchange have led to the discovery of millions of dollars of unpaid royalties by Music Choice and Muzak alone – the only entities subject to 37 C.F.R. § 382.7(d). Complaint ¶¶ 24-26, *SoundExchange v. Music Choice*, No. 1:19-cv-999 (D.D.C. Apr. 10, 2019), ECF No. 1 (“SoundExchange Complaint”); *SoundExchange, Inc. v. Muzak, LLC*, 854 F.3d 713 (D.C. Cir. 2017). In addition to a history of underpayment, Music Choice has a history of non-compliance with requests from the independent auditors engaged by SoundExchange.¹⁵ This history highlights why a fox-guarding-the-henhouse approach to audits does not work.

Allowing a service provider like Music Choice to avoid an audit conducted at SoundExchange’s initiative effectively leaves compliance with statutory license requirements to the discretion of the licensee. Rather than meaningful oversight, “defensive audits” create perverse incentives, which risk encouraging sloppy accounting or outright gamesmanship. Amending § 382.7(d) to include a scope limitation will reduce perverse incentives and opportunities for PSS providers to avoid compliance with statutory license obligations, enable SoundExchange to initiate

¹⁵ Independent auditors have twice examined Music Choice on SoundExchange’s behalf. The first of these audits revealed a net liability of more than [REDACTED]. Ex. L at SXREMAND000000062; *see also* Exs. M, N. In the second, Music Choice [REDACTED]. Stark Decl. ¶ 7; Ex. O at SXREMAND000000173-SXREMAND000000174 (Mar. 28, 2017 Email from Paula Calhoun, Music Choice to Brienne Jackson, SoundExchange); Ex. P at SXREMAND000000295 (Apr. 27, 2017 Letter from Brienne Jackson, SoundExchange to Paula Calhoun, Music Choice). Music Choice also [REDACTED]. *See* Ex. O at SXREMAND000000173 [REDACTED]; *see also* Ex. Q at SXREMAND000000154 n.1 [REDACTED]. Despite the limited access provided, the audit discovered that Music Choice had systematically underpaid statutory royalties for its business establishment service by millions of dollars. This underpayment is the subject of pending litigation. SoundExchange Complaint ¶¶ 24-26. Additionally, Music Choice [REDACTED]. *See* Stark Decl. ¶ 6 n.3.

audits that will provide artists and copyright owners confidence that PSS providers are paying them what they owe, and minimize the waste of time and resources that follow from disputes arising under the current provision.

Fourth, the structure and procedures around statutory royalty payments have changed since the PSS defensive audit provision was first adopted. *See* 970 F.3d at 429 (suggesting Judges should “address CARP’s initial reasoning for instituting the defensive audit procedure, which sought to balance the preexisting services’ burden and expense against copyright holders’ audit rights”). The language was originally crafted almost twenty-five years ago, in the *PSS I* rate-setting proceeding before a copyright arbitration royalty panel (“CARP”). *See* SoundExchange PFoF ¶ SEPFF2301. At this time, SoundExchange did not yet exist, and all copyright owners – potentially tens of thousands of them – were treated as “interested parties” with an individual right to audit licensees. *See id.* In that context, the potential burden on licensees was much greater, since – in the absence of a defensive audit provision – a service might have to fend off numerous audits from “interested party” copyright owners. This risk was mitigated when the audit right was later limited to only the designated Collective—*i.e.*, SoundExchange. *See* 37 C.F.R. § 382.7(a) (“The Collective may audit a Licensee’s payments of royalties to the Collective and a Copyright Owner or Performer may audit the Collective’s distributions of royalties to the Copyright Owners or Performers.”). In such a one-on-one context, [REDACTED]

[REDACTED]

[REDACTED]¹⁶

Fifth, good and reasonable responses dispose of the other concerns raised in the D.C. Circuit opinion. For instance, the Court asks what has changed since the Judges rejected an

¹⁶ *See, e.g.*, SoundExchange PFoF ¶¶ SEPFF2234-SEPFF2248.

amendment to the PSS audit provision in 2013; but the Court also notes that in the 2013 proceeding, “SoundExchange failed to rebut Music Choice’s argument that the change would ‘permit SoundExchange to use auditors that are employees or officers of a sound recording owner or performing artists, the objectivity of which might be suspect.’” 970 F.3d at 429 (citation omitted). Regardless of how SoundExchange may have responded at the time, the concern Music Choice raised was a strawman. The regulations themselves include a requirement that the auditor be independent. A PSS audit under section 382.7(d) must be conducted by a “Qualified Auditor,” and the regulations define “Qualified Auditor” as “an *independent* Certified Public Accountant licensed in the jurisdiction where it seeks to conduct a verification.” 37 C.F.R. 380.7 (emphasis added).

Additionally, the Court encouraged the Judges to consider the argument that amending the audit provision would upset Music Choice’s reliance on the previous audit provision in deciding to invest in defensive audits. 970 F.3d at 429. However, the change at issue here is largely prospective. The terms adopted in this proceeding will be in effect through 2027. 17 U.S.C. § 804(b)(3)(B). Music Choice obviously has not invested anything in auditing its royalty payments for 2021-2027. The Judges’ change to the regulation is also crafted narrowly enough to avoid upsetting any reliance issue. If the amendment is adopted, Music Choice will still be able to conduct defensive audits and determine the scope of those audits itself. The scope limitation means that those investments will dictate the amount of protection the defensive audit procedure affords. In other words, whatever effort and resources Music Choice puts in to conducting defensive audits, it will get an equivalent amount of relief from potential outside audits of the same scope.

For all of the foregoing reasons, the Judges should stand by their amendment of the PSS audit provision as it was originally published in the underlying Determination. *See* 83 Fed. Reg. at 65,268 (amending 37 C.F.R. § 382.7(d)).

CONCLUSION

SoundExchange respectfully requests that the Judges again find that Music Choice may not pay for its current internet transmissions at grandfathered rates. SoundExchange further requests that the Judges re-promulgate the scope limitation in the PSS audit provision, 37 C.F.R. § 382.7(d).

Dated: June 30, 2021

Respectfully submitted,

/s/ Emily L. Chapuis

Emily L. Chapuis (D.C. Bar # 1017600)
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Counsel for Plaintiff SoundExchange, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was filed electronically through the eCRB filing system on June 30, 2021 and will therefore be served electronically on all counsel.

Dated: June 30, 2021

/s/ *Emily L. Chapuis*
Emily L. Chapuis

Exhibit A

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

In the Matter of:

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR
(2018-2022) (Remand)

Declaration of Lewis Stark

I, Lewis Stark, submit the following declaration based on my personal experience conducting royalty verification procedures, including leading independent royalty verifications of Music Choice. I am fully familiar with the facts set forth herein, and if called upon to testify could do so truthfully and competently. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following statements are true and correct:

1. I am a Partner in the Royalty Audit & Contract Compliance Department of Prager Metis CPAs, LLC, and a member of Prager Metis International Group. I joined Prager Metis in 2017. Prior to that, I spent a decade as a partner and led the Royalty Audit & Contract Compliance group at EisnerAmper, LLP, another large national accounting firm. I am a Certified Public Accountant and a Certified Fraud Examiner, and I have more than 25 years of experience in the accounting industry. My practice focuses on royalty, distribution, and profit participation audits; contract compliance investigations; and financial due diligence reviews. I have conducted hundreds of royalty audits in my career, and I am considered an industry expert on royalty-related issues involving licensors/licensees.

2. The royalty verification procedures that Prager Metis conducts on behalf of SoundExchange (colloquially referred to as “audits” or “royalty audits”) have a different purpose and scope than the type of audit BDO performed for Music Choice.¹ The BDO audit provided an opinion as to whether Music Choice’s royalty statements prepared by management were presented fairly or unfairly in material respects in conformity with Generally Accepted Accounting Principles. Determining what discrepancies rise to the level of “materiality” is based on the discretion of the auditor, and an auditor’s opinion that a royalty statement has been presented *fairly* is not tantamount to a finding that every number on the royalty statements is accurate.² Thus, BDO’s opinion does not reflect a specific determination that royalties were correctly calculated or paid. Furthermore, the standard in which BDO conducted their audit only allows them to express an opinion. They were prohibited from presenting schedules that showed any discrepancies they found.

3. Royalty audits, like those that I regularly conduct on behalf of SoundExchange and other clients, go further. In addition to considering the information presented on the royalty statements, we assess the company’s underlying procedures and calculations, and undertake more detailed testing focused on royalties. These additional steps allow us to identify errors that might affect the calculation of royalties and, importantly, to *quantify* and present the impact of these errors on the royalties actually paid. In other words, a royalty audit allows us to quantify

¹ [REDACTED]

² What constitutes a “material” difference can also vary based on the context that an auditor has in mind. For instance, a royalty underpayment of several hundred thousand dollars might not be material with respect to Music Choice’s overall financial condition as a company; but that same amount might be very material from the perspective of SoundExchange and the recording artists and copyright owners to whom it distributes royalties.

the difference between what a licensee actually paid and what it should have paid—and to explain the reasons for this difference as opposed to just expressing an opinion about whether royalty statements were presented fairly. Our audit reports are transparent and informative, setting forth the testing procedures performed and conclusions reached as a result of each procedure.

4. With respect to statutory license audits (royalty verifications), my understanding is that the Copyright Royalty Judges have determined that these additional steps are required. The relevant regulations specify that the purpose of a statutory license audit is to “verify” payments and distributions of statutory royalties. 37 C.F.R. 382.7(a). The regulations further specify that a statutory license audit “shall determine the accuracy of royalty payments or distributions, including whether the Payor made an underpayment or overpayment of royalties.” 37 C.F.R. 382.7(d).

5. I was first retained by SoundExchange to perform royalty audits in approximately 2013. Since that time, I have been engaged by SoundExchange to verify the accuracy of royalty payments made by various statutory licensees, including Sirius XM, Music Choice, Mood Media, Muzak, and others. Through these royalty audits, Prager Metis identified and quantified any discrepancies between what the licensee paid and what it should have paid.

6. SoundExchange has twice retained me and my team to conduct royalty audits of Music Choice’s business establishment service (“BES”) and its preexisting subscription service (“PSS”). The first Music Choice audit, which was intended to cover the period 2014 to 2016, is the subject of this declaration.³ I was the project lead in connection with this royalty audit.

³ SoundExchange also engaged me to conduct a royalty audit of Music Choice related to the period 2017 through 2020. [REDACTED].

7. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

8. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

9. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

10. Had Prager Metis been permitted to complete a royalty audit of Music Choice's PSS for this period, we would have undertaken additional procedures to "determine the accuracy of royalty payments or distributions, including whether the Payor made an underpayment or overpayment of royalties." 37 C.F.R. 382.7(d). These would have included the following:

- Reviewing and analyzing Music Choice’s PSS royalty calculations and the assumptions used to create its royalty statements.
- Reconciling receipts from PSS customers to the Statements of Account (royalty statements) provided to SoundExchange.
- Evaluating whether Music Choice correctly classified categories of transmissions as eligible for the PSS rate, including by examining a sample of customer contracts to see how Music Choice treats fees paid by customers of multiple services and testing any allocation of royalties among different services.
- Conducting customer continuity testing, in order to determine whether the data Music Choice provided included all payments required from each customer during the period.
- Reconciling Music Choice’s cash receipts and balances to revenue recorded on its trial balance and financial statements to confirm that revenue was complete and properly accounted for.
- Determining whether Music Choice improperly excluded revenue in the same manner as it did for its BES 2015 and 2016 royalties.
- Conducting additional accuracy and completeness tests.

11. [REDACTED]
[REDACTED]
[REDACTED].

12. The differences between the scope of BDO’s defensive audit and the scope of the royalty audits Prager Metis conducts have real consequences. Our past royalty audits for SoundExchange have identified issues with royalty payments from various statutory licensees, including Music Choice, that BDO’s approach may not have found or reported.

13. For instance, in examining Music Choice’s BES royalties, we found (among other things) that the company had systematically underpaid royalties by incorrectly excluding revenue derived from its BES customers based on an extreme interpretation of the applicable

regulations.⁴ Due to the scope of the procedures employed, the type of audit BDO conducted may not have identified this issue.

14. This is just one illustration of the meaningful differences between the scope of Prager Metis' royalty audits and the scope of the "defensive audit" conducted by BDO. Regardless of how studiously BDO performed the scope of procedures it was assigned, the "defensive audit" that Music Choice commissioned cannot serve the same function as a proper royalty audit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29 day of June 2021.

A handwritten signature in blue ink, appearing to read "Lewis Stark", is positioned above a horizontal line.

Lewis Stark, CPA, CFE
Prager Metis CPAs, LLC

⁴ I understand that SoundExchange and Music Choice are engaged in litigation about this issue.

Exhibit B

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

In the Matter of:

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR
(2018-2022) (Remand)

DECLARATION OF ANDREW B. CHERRY

I am counsel for SoundExchange, Inc. in Docket No. 16-CRB-0001-SR/PSSR (2018-2022) (Remand), and I am authorized to submit this declaration in support of SoundExchange’s Opening Brief on Remand.

1. On March 30, 2021, I used the Wayback Machine on the Internet Archive website to access an archived version of Music Choice’s website. I caused a number of screen captures of the archived version of Music Choice’s website to be captured, which are attached hereto.
2. On March 30, 2021, I caused a screen capture to be taken of archived versions from January 17, 1997 and April 18, 1997 of <http://www.musicchoice.com/faq/html>, which can be accessed by visiting the following URL:

<https://web.archive.org/web/19970418022232/http://www.musicchoice.com/faq.html>.

A true and correct copy of that screen capture is attached hereto as Exhibit C.

3. On March 30, 2021, I caused a screen capture to be taken of an archived version from January 17, 1997 of <http://www.musicchoice.com/jax.html> which can be accessed by visiting the following URL:

<https://web.archive.org/web/19970117002155/http://www.musicchoice.com/jax.html>.

A true and correct copy of that screen capture is attached hereto as Exhibit D.

4. On March 30, 2021, I caused a screen capture to be taken of an archived version from July 5, 1998 of <http://www.musicchoice.com/who/index.html>, which can be accessed by visiting the following URL:

https://web.archive.org/web/19980705021020fw_/http://www.musicchoice.com/who/index.html.

A true and correct copy of that screen capture is attached hereto as Exhibit E.

5. On March 30, 2021, I caused a screen capture to be taken of an archived version from July 5, 1998 of <http://www.musicchoice.com/home/index.html>, which can be accessed by visiting the following URL:

<https://web.archive.org/web/19980705020605/http://www.musicchoice.com/home/index.html>.

A true and correct copy of that screen capture is attached hereto as Exhibit F.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing declaration is true and correct.

[signature block on following page]

Dated: June 29, 2021
Arlington, Virginia

Respectfully submitted,

/s/  
Andrew B. Cherry

Exhibit C

http://www.musicchoice.com/faq.html

Go

JAN APR MAY

◀ 18 ▶

1996 1997 1998

2 captures

17 Jan 1997 - 18 Apr 1997

ⓘ ? ✕

⌂

▼ About this capture

MUSIC CHOICE Home Page | Where do I go next?

MUSIC CHOICE Frequently Asked Questions

- 1. What is MUSIC CHOICE?**
- 2. How does MUSIC CHOICE work?**
- 3. What kind of equipment do I need for MUSIC CHOICE?**
- 4. How do I get MUSIC CHOICE?**
- 5. What channels does MUSIC CHOICE offer?**
- 6. How much does MUSIC CHOICE cost?**
- 7. Do the MUSIC CHOICE channels have song announcements?**
- 8. How are the MUSIC CHOICE channels programmed?**
- 9. Can I make a request?**
- 10. How current is the music on MUSIC CHOICE?**
- 11. How many songs are programmed on each channel?**
- 12. How often will I hear the same songs?**
- 13. Why is MUSIC CHOICE better than what's available on radio?**
- 14. Corporate Background**

1. What is MUSIC CHOICE?

MUSIC CHOICE is a CD quality music service that comes into your home or business via cable or DIRECTV. The service provides more than 30 diverse channels of music that is appealing to the entire household. The music is delivered 24 hours a day, 7 days a week with no interruptions (no commercials, no DJs). MUSIC CHOICE is a great way to enjoy music in your home because it lets you set the mood according to how you feel. It's one of life's basic necessities!

MUSIC CHOICE offers a wide variety of musical genres for every listener including (but not limited to) classical, rock, new age, country, jazz and a special music channel programmed exclusively for children.

2. How does MUSIC CHOICE work?

MUSIC CHOICE originates from the MUSIC CHOICE uplink facility in New York City. The pure digital signal is transmitted via satellite to cable operators, which is then distributed via the cable lines to the consumer.

After receiving the signal, subscribers (residential and commercial) receive digital tuners which are plugged into their stereo systems.

MUSIC CHOICE is also available to consumers via DIRECTV, a direct broadcast satellite service serving North America.

3. What kind of equipment do I need for MUSIC CHOICE?

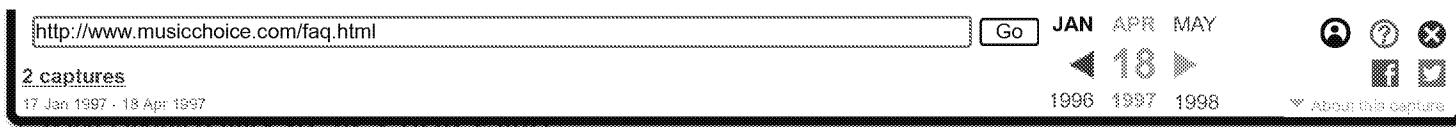
Anything with left and right audio input jacks...such as...

- Stereo receivers
- Amplified speakers
- Some portable boom boxes
- Stereo VCR

4. How do I get MUSIC CHOICE?

MUSIC CHOICE is available nationwide in approximately 225 cable systems, it is also available as a basic service on DIRECTV which is a direct broadcast satellite service serving North America.

MUSIC CHOICE is also available as part of Continental Cablevision's High Speed Internet Service in Jacksonville, Florida. For more information, please read our [press release](#).



MUSIC CHOICE offers more than 30 channels of music ranging from jazz to rock to country to reggae to big band to oldies (*and more*). For a complete list, look at our [channel list](#).

6. How much does MUSIC CHOICE cost?

The cost varies with each individual cable company, however, many are offering MUSIC CHOICE in their packages and tier services for no additional charge. MUSIC CHOICE is included in the basic programming line-up on DIRECTV.

Contact your individual cable company for more details.

7. Do the MUSIC CHOICE channels have song announcements? How do I know what song is playing?

In order to provide our listeners with complete song enjoyment, MUSIC CHOICE does not announce songs over the air. Nevertheless, there are ways to obtain song information.

- Cable subscribers can access the MUSIC CHOICE automated song information line at (718) 370-4444. All you need is a touch-tone telephone to find out the song title, artist, CD and record label for the currently playing and two previously played songs for channels 1-30, 31, 32, 34 and 99.
- Some cable operators offer a "Maestro Remote Control", a universal remote control which accompanies the MUSIC CHOICE tuner allowing the listener to obtain song information on the remote screen. Contact your cable operator to find out whether they offer the Maestro.
- Song information is also available on-screen if your cable operator uses a new General Instrument combined converter/tuner called the CFT-2200. The information can be called up on-screen like any other on-screen features.

8. How are the MUSIC CHOICE channels programmed?

The MUSIC CHOICE programming department includes experts in each of the genres of music offered. The programmers are responsible for selecting the music which is played on each channel. Each channel has a CD library which encompasses thousands of CDs. Guidelines are established for each channel in which the programming criteria is set determining the appropriate rotation and placement of a song.

The programming is updated on an ongoing basis to provide listeners with an endless array of choice. The amount of repetition on any given channel will depend on the format of music. For instance, repetition will be higher on the Hit List channel which plays primarily current top 40 type music versus the Classic Rock channel which has a more extensive playlist and the music spans a longer period of time.

MUSIC CHOICE also works closely with its three record company partners, EMI Music, Sony Software Corporation, and Warner Music Group, to keep on top of music industry trends. In addition to our partners, and set programming criteria, MUSIC CHOICE conducts extensive listenership surveys to determine channel improvements and enhancements.

9. Can I make a request?

The channels are programmed by each individual programmer, therefore, MUSIC CHOICE does not take requests for songs. Our customer service department is always happy to take calls or email regarding the content of our programming and will pass along specific programming feedback to the programming department.

10. How current is the music on MUSIC CHOICE?

MUSIC CHOICE reviews new releases from all record companies. The Hit List channel, for instance, plays almost exclusive new recent top hits. All channels are updated weekly at a minimum by the programmer responsible for the channel.

11. How many songs are programmed on each channel?

Each channel differs but the average is 2,500 songs (*that's per channel*). Only the best songs from each CD are chosen for play. Although an extensive library is key to each format to insure more variety, the quality of each song chosen is equally important.

http://www.musicchoice.com/faq.html

Go

JAN APR MAY

◀ 18 ▶

1996 1997 1998

2 captures

17 Jan 1997 - 18 Apr 1997

▼ About this capture

Channels have extensive CD libraries, it is unlikely that you will hear the same song twice in a week. However, on our Internet channel, there is a high repetition so that at any given time you will hear only today's hottest music.

13. Why is MUSIC CHOICE better than what's available on radio?

MUSIC CHOICE is not advertiser supported which means we can program the channels for our listeners, not advertisers. Generally, the MUSIC CHOICE channels have more extensive CD libraries than radio stations and MUSIC CHOICE plays many more songs from CDs than just the top hits. MUSIC CHOICE is also completely commercial free, with no announcements.

14. Corporate Background

Headquartered in Horsham, Pennsylvania, MUSIC CHOICE is a programming service of Digital Cable Radio ("DCR"), the world's first digital audio provider. DCR is a partnership between General Instrument Corporation, subsidiaries of Sony Software Corporation, Warner Music Group, Inc., EMI Music and several leading United States cable operators: Adelphia Cable Communications, Comcast Cable Communications, Continental Cablevision, Cox Cable Communications and Time Warner Cable.

The MUSIC CHOICE FAQ | [How do you get MUSIC CHOICE](#) | [Channels](#) | [DIRECTV Channel List](#) | [Specials and Music Blocks](#) | [Contact us](#) | [MUSIC CHOICE for Business](#) | [Press Releases](#) | [MUSIC CHOICE Home Page](#)

*Copyright 1996 MUSIC CHOICE
updated 10.23.96
This page is [Netscape](#) enhanced.*

Exhibit D

<http://www.musicchoice.com/jax.html>

Go

DEC JAN FEB

◀ 17 ▶

1996 1997 1998



▼ About this capture

1 capture

17 Jan 1997

**FOR IMMEDIATE RELEASE**Contact: [Christina Tancredi/MUSIC CHOICE](#)**MUSIC CHOICE TO LAUNCH ON CONTINENTAL CABLEVISION'S
HIGH-SPEED INTERNET SERVICE IN JACKSONVILLE, FL**

Horsham, PA — September 23, 1996 — MUSIC CHOICE and Continental Cablevision's Southeastern Region today have announced that 10 of MUSIC CHOICE's audio channels will be included in Jacksonville's Highway1 high-speed Internet service launch scheduled for today.

Customers purchasing the Highway1 service from Continental Cablevision will receive 10 MUSIC CHOICE channels as part of the entire package being offered. The channels include Hit List, Body & Soul, Lite Jazz, Eclectic Mix, Classical Favorites, Country and others representing a wide variety of musical genres for customers to select. By including MUSIC CHOICE as part of the Continental service offering, consumers will have the ability to surf the net while listening to music. Studies have found that consumers spend more time listening to music since purchasing PCs. PC ownership among music consumers has grown 60% since 1990, therefore offering MUSIC CHOICE to those using their PCs is a natural migration for the company.

"We at MUSIC CHOICE are very excited about being able to offer our audio channels through another distribution point. MUSIC CHOICE provides operators the ability to offer high speed data service that exceeds the offerings of traditional providers" states Dave Del Beccaro, President of MUSIC CHOICE. Doug Perkins, Regional Director of Internet & High Speed Data Services at Continental's Southeastern Region agrees, "MUSIC CHOICE provides the perfect complement to the cable modem service being provided by Continental. It has always been Continental's position to be a full service entertainment provider to all of our consumers and by offering high speed access to the internet and other local content services, people will have the opportunity to do many things with Continental on the Internet."

Additional information may be found on the following websites:

Highway1	http://www.highway1.com
Continental Cablevision	http://www.continental.com
Continental Southeast Region	http://www.ccse.net
Music Choice	http://www.musicchoice.com

Headquartered in Horsham, Pennsylvania, MUSIC CHOICE is a programming service of Digital Cable Radio Associates ("DCR"), the world's first digital audio provider. DCR is a partnership between General Instrument Corporation, subsidiaries of Sony Software Corporation, Warner Music Group, Inc., EMI Music and several leading US cable operators: Adelphia Cable Communications, Comcast Cable Communications, Continental Cablevision, Cox Cable Communications and Time Warner Cable.

[The MUSIC CHOICE FAQ](#) | [How do you get MUSIC CHOICE](#) | [Channels](#) | [DIRECTV Channel List](#) | [Specials and Music Blocks](#) | [Contact Us](#) | [MUSIC CHOICE for Business](#) | [Press Releases](#) | [MUSIC CHOICE Home Page](#)

*Copyright 1996 MUSIC CHOICE
updated 10.10.96*

Exhibit E



who we are



MUSIC CHOICE Is Your Music Source

At MUSIC CHOICE - we have every kind of music imaginable. And we serve it up in ways that make it easier for you to get and enjoy.

We Offer:

- A unique CD-quality music programming service delivered straight to your home or business via cable, regional Bell operating companies and DIRECTV broadcast satellite service in the U.S.
- Digital audio channels delivered without commercials or interruptions, 24 hours a day.
- Expert programming, giving you access to one of the largest music libraries, with a wide range of music formats for a total music experience.
- Exclusive specials and music blocks, including rock, pop, jazz, classical, children's and more.
- The MUSIC CHOICE Store, where you can purchase all your favorite music and music-related products. Visit us Online Today!
- Business music services packaged to meet the needs of a variety of commercial establishments.

And More

- Did you know that we were the world's first digital audio music service? Over 4 million people currently enjoy our service, we hope you will too! To learn more about MUSIC CHOICE please browse our site.

How It Works

The curious and technical minded alike will get an overview of our digital audio technology. ◆

Corporate Background

Do you want more information about us and our partners? ◆

Press Milestones

A time line into the world of MUSIC CHOICE. See what we've been up to. ◆

Career Opportunities

Come be a part of our success story! If you have a passion for music and like working in a dynamic environment, consider joining the MUSIC CHOICE team. ◆

Around The World

Get MUSIC CHOICE in Latin America and Europe. ◆

Exhibit F

http://www.musicchoice.com/home/index.html JUN JUL AUG
1 capture 05
5 Jul 1998 1997 1998 1999 About this capture



get MUSIC CHOICE



MUSIC CHOICE Is Your Source For Music In Your Home

Go beyond the noise of music video and radio stations. Experience the next evolution of music in your home with MUSIC CHOICE digital audio service.

What You Get With MUSIC CHOICE

- Over 30 CD-quality audio music channels 24 hours a day.
- A wide variety of music format [Channels](#), [Exclusive Specials](#) and [Music Blocks](#).
- Your favorite music without commercials or interruptions.
- Song ID feature lets you know what's playing to add to your CD library. *(Not available everywhere)*
- Your own personal shopper with [The MUSIC CHOICE Store](#), by calling 1 (888) M-C-STORE toll free in the U.S. or visit us Online today!

Plus...

- Play [Music Trivia](#) and test your music IQ w/ ten different categories with MUSIC CHOICE Online.
- Check Out [This Day In Music](#) and get a chronological listing of notable music events for both past and present.

And...

- Coming soon to a cable modem service near you, enjoy MUSIC CHOICE CD-quality audio channels on your PC while you surf the net or use a PC/CD Rom.

What You Need To Receive MUSIC CHOICE At Home In The U.S.

- A TV and/or a stereo.
(speakers or stereo TV suggested, but not required)

How To Get MUSIC CHOICE

In the U.S., MUSIC CHOICE is available nationwide from over 240 cable systems, regional Bell operating companies, C-BAND and on DIRECTV broadcast satellite service. For channel line-up information, please contact your local provider.

Enter your zip code below for a listing in your area.

http://www.musicchoice.com/home/index.html

Go

JUN JUL AUG

◀ 05 ▶

1997 1998 1999

▼ About this capture

1 capture

5 Jul 1998

In Latin America and Europe, please see [MUSIC CHOICE Around The World](#) for information.

Now you can take MUSIC CHOICE to work with you...
tell your employer about [MUSIC CHOICE for Business](#).

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MUSIC CHOICE is a service mark of Digital Cable Radio Associates, Horsham PA

Exhibit G

**RESTRICTED – Subject to Protective Order
in Docket No. 16-CRB-0001 – SR/PSSR
(2018-2022) (Remand)**

Exhibit H

Music Choice goes surfin'

Cable & Satellite Europe

December 1997

Copyright 1997 Responsive Database Services, Inc.

All Rights Reserved

Business and Industry

Section: No. 168

Length: 197 words

Highlight: **Music Choice** Europe is in a trial stage with a new service for cable Internet customers, together with Telewest, **Music Choice** is developing a graphical interface

Body

Pay audio provider **Music Choice** Europe is trialling a new service for cable Internet customers. Together with the cable operator Telewest, **Music Choice** is developing a graphical interface, which will allow customers to view the title of the track and additional information.

Four channels will be provided which can be accessed while customers are surfing the web. The only additional equipment needed in addition to the PC and cable modem is a suitable Plug-In such as Telos Systems' Audioactive. Telewest has recently completed a series of modem trials in Basildon and is scheduled to commence a second phase in Edinburgh early next year.

Telecom Finland customers have been able to access **Music Choice** through the Quicknet Service since the beginning of the year. A similar trial has been conducted by **Music Choice** US with Cablevision, **Florida**.

Telewest will take its feed of the **Music Choice** service by satellite before converting the four audio channels into an MPEG Layer 3 audio stream using Audioactive encoders provided by Telos Systems.

The full **Music Choice** service provides 50 channels of different musical genres. Copyright 1997 Informa UK Ltd
Copyright 1997 Informa UK Ltd176

Load-Date: December 29, 2004

Exhibit I

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR (2018–
2022) (Remand)

MUSIC CHOICE’S OBJECTIONS AND RESPONSES TO SOUNDEXCHANGE’S

FIRST SET OF INTERROGATORIES

Pursuant to the Copyright Royalty Judges’ Order Regarding Proceedings on Remand (dated Dec. 1, 2020), 17 U.S.C. § 803(a)(1) and 37 C.F.R. § 351.15, Music Choice serves the following Objections and Responses (“Responses”) to the First Set of Interrogatories served by SoundExchange, Inc., *et al* (collectively, “SoundExchange”) as follows.

GENERAL OBJECTIONS

1. Music Choice objects to the Interrogatories as overbroad and unduly burdensome to the extent any Interrogatory would require Music Choice to spend an unreasonable or disproportionate amount of time, effort, and resources in order to respond when balanced against the potential probative value of the information requested, and to the extent that full compliance with any Interrogatory is not possible in the time allowed by the discovery schedule.

2. Music Choice objects to the Interrogatories as irrelevant to the extent they seek information not directly related to the issues to be determined in this remand proceeding, namely whether the Music Choice internet transmissions are eligible for the PSS rates and terms, and

whether SoundExchange has provided any justification for its proposed revision to the Defensive Audit Provision.

3. Music Choice objects to the Interrogatories to the extent they or the Definitions and Instructions contained therein cause any part of the Interrogatory to be vague, ambiguous, and/or confusing.

4. Music Choice objects to the Interrogatories and the Definitions and Instructions contained therein to the extent that SoundExchange seeks to impose on Music Choice any obligation different from and broader than that provided for, required by, or permitted by the Copyright Act and any applicable regulations, rules, case law, or future court orders governing the proper scope, timing and extent of discovery in this proceeding.

5. Music Choice objects to the Interrogatories to the extent they seek information which is cumulative, duplicative, or may be obtained by SoundExchange from some other source that is more convenient, less burdensome, or less expensive, including information or documents that have previously been produced by Music Choice, are publicly available or otherwise accessible to, or in the possession of, SoundExchange or its representatives, attorneys, agents, or members.

6. Music Choice objects to the Interrogatories insofar as they seek information that: (1) was prepared for, or in anticipation of, litigation; (2) constitutes attorney work product; (3) contains confidential attorney-client communications; (4) is subject to common interest privilege; or (5) is otherwise privileged, protected or subject to exemption from disclosure by any statute, rule, regulation, common law, or other principle, or any other basis recognized under applicable law.

7. Music Choice objects to the Interrogatories to the extent they seek production of information regarding Music Choice's business establishment service or any other service offering other than Music Choice's consumer subscription audio service that is the subject of this proceeding (the "Music Choice PSS"). Subject to its General Objections, Objections to Instructions and Definitions, and Specific Objections and Responses below, Music Choice will only produce responsive information to the extent it is related to the Music Choice PSS.

8. Music Choice objects to the Interrogatories as improperly numerous on the grounds that, because many of the interrogatories are compound, SoundExchange has exceeded the five interrogatories allotted each Party in this proceeding under the operative discovery scheduling order.

9. Music Choice will produce confidential, proprietary, or other commercially sensitive information subject to the terms of the Protective Order that has been issued in this proceeding.

10. Music Choice's objections and responses, and omissions from the objections and responses, are not and should not be deemed to be an admission of the existence or non-existence of any documents or information or of the relevance or admissibility of any documents or information produced. To the extent Music Choice agrees to produce documents or information, that agreement covers only documents or information within its possession, custody or control.

11. Music Choice has made, and will continue to make, a good-faith, reasonable effort to search for and retrieve responsive documents and/or information, and reserves the right to supplement its production in response to the Interrogatories.

SPECIFIC OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. Music Choice objects to the definition of the terms “reflecting,” “referring,” “concerning,” “relating to,” “related to” and “showing” as overbroad, unduly burdensome, and not proportional to any likelihood of discovering relevant evidence. For the purposes of its Responses, Music Choice will interpret the terms "concerning," "regarding," “relating to” and their variants as meaning relating to, referring to, discussing, describing, evidencing, evaluating, constituting, comprising, memorializing, or analyzing.

2. Music Choice objects to the definition of “Audit” as overbroad and not proportional to any likelihood of discovering relevant evidence to the extent it refers to any audit or verification unrelated to the Music Choice PSS. For the purposes of its responses, Music Choice will interpret the term “Audit” to refer to such procedures related to any royalty obligation owed by a PSS under the statutory licenses in 17 U.S.C. §§ 114 and 112(e).

3. Music Choice objects to the instruction “[w]hen the identity or description of a document is requested or referred to in response to an Interrogatory, please indicate: (a) the type of document, such as a letter, memorandum, e-mail message, etc.; (b) the title, if any, of the document; (c) the date of the document; (d) the identity of the individual who authored the document; (e) the identity of the individuals to whom the document is addressed; and (f) the Bates number(s) of the document (if applicable).” as unduly burdensome and outside the scope of Music Choice’s legal obligations in this proceeding. Such efforts are not required by any applicable law, regulation, or precedent, and would require disproportionate amounts of time, effort and resources and would be unlikely to lead to the production of probative information.

4. Music Choice objects to the instruction that “[u]nless otherwise indicated, the Interrogatories below cover the time period from January 1, 1996 through the present.” The

search and review of three decades' worth of information relating to the broad scope of issues touched upon by SoundExchange's interrogatories would be unreasonably timely, costly, and would not ultimately be proportional to the needs of this case. Except where specifically indicated otherwise in Music Choice's responses, Music Choice will produce responsive information pertaining to the time period January 1, 1996-December 31, 1998 and the current rate period January 1, 2018 through the present.

SPECIFIC OBJECTIONS TO INTERROGATORIES

INTERROGATORY NO. 1:

State how Music Choice is prejudiced by any changes made to the Acceptable Procedure Provision.

RESPONSE TO INTERROGATORY NO. 1:

Music Choice objects to Interrogatory No. 1 to the extent it seeks information that is covered by the attorney client privilege, work product privilege, or any other privilege or immunity. Music Choice further objects to Interrogatory No. 1 as overbroad to the extent it seeks information regarding "any changes" to the provision in question and is not limited to the specific regulatory language change at issue in this remand proceeding. Music Choice further objects to Interrogatory No. 1 on the grounds that it is irrelevant to the issues to be determined in this remand proceeding, namely whether SoundExchange has provided any justification for its proposed revision to the Defensive Audit Provision. Subject to and without waiving its General Objections, Objections to Instructions and Definitions and Specific Objections to this Request, Music Choice responds as follows:

For over 20 years since establishment of the regulatory terms for the PSS license, Music Choice has had the right to secure its own independent "defensive" audits to provide an acceptable verification of its PSS royalty payments (*i.e.*, an audit "performed in the ordinary course of business in accordance with generally accepted accounting standards by an

independent and Qualified Auditor, shall serve as an acceptable verification procedure for all interested parties”). Under the current provision, as long as Music Choice’s defensive audit is performed by a qualified, independent auditor in accordance with GAAP, Music Choice is entitled to use such audit to verify its PSS royalties and forestall any further audits. This audit right was included in the original PSS regulations as a result of the 1996-1997 CARP proceeding for the express purpose of allowing PSS like Music Choice to avoid the undue burden and expense of collective-initiated audits while still protecting copyright owners with a fair opportunity for an independent audit. SoundExchange is seeking a material change to Music Choice’s audit right opening Music Choice up to additional audits for anything deemed to be outside the “scope” of the defensive audit.

Music Choice had to endure a SoundExchange PSS audit in the mid- 2000s in which SoundExchange took outrageous positions, alleging underpayments based on aggressive misinterpretations of the regulations, in order to extract unwarranted settlements. In the end, Music Choice settled with SoundExchange for a very small fraction of the amount claimed - but only after several years and at significant burden and expense. As a result, since then Music Choice has availed itself of its defensive audit rights, expending significant resources over the last twelve-plus years to obtain independent audits of its PSS royalty payments in compliance with the regulations. These resources include extensive internal time spent by Music Choice’s accounting staff and management team while providing the required information to the independent auditors, as well as out-of-pocket fees paid to the firms conducting those audits. SoundExchange has actually benefited from Music Choice’s defensive audits in the few instances where Music Choice discovered late payments and proactively remitted those amounts – with interest – to SoundExchange, much sooner than they would have been found – if ever – by SoundExchange’s own audit. Music Choice has further complied with the regulations by

providing copies of its defensive audits and underlying documents when requested by SoundExchange.

With SoundExchange's proposed changes to the defensive audit regulation, all resources Music Choice expended in connection with several years of its defensive audits - including those covering years that SoundExchange has recently noticed its intent to audit - in reliance upon its current audit rights would be wasted, and Music Choice would have the added burden of being exposed to intrusive, never-ending SoundExchange audits (similar to what it experienced before) to debate what is within or without the ambiguous "scope" of audit. As a relatively small company with more limited resources, these external audits are especially onerous on Music Choice. The unnecessary expense and disruption to Music Choice from these additional audits is exactly what the original regulations were enacted to avoid, and SoundExchange has yet to show any justification for these changes.

INTERROGATORY NO. 2:

Identify and describe every instance in which Music Choice has conducted a Defensive Audit. For each Defensive Audit, please describe:

- a. The dates on which the Defensive Audit commenced and concluded;
- b. The type of transmissions and period of usage covered, and any exclusions from the scope of the Defensive Audit;
- c. The identity of the individual auditors and firm(s) and any relationship between Music Choice and the auditor apart from the specific Defensive Audit described;
- d. The type of Engagement pursuant to which the auditor conducted the Defensive Audit and the procedures followed;
- e. The findings and whether the auditor provided a written report of any kind.

RESPONSE TO INTERROGATORY NO. 2:

Music Choice objects to Interrogatory No. 2 as overbroad, unduly burdensome, and irrelevant to the extent it seeks information relating to Defensive Audits conducted for service

offerings other than Music Choice's PSS service. Only the audit provision for the PSS statutory license is at issue in this remand proceeding, so Defensive Audits of, *e.g.*, Music Choice's commercial music service – which is subject to a different statutory license and terms - are not relevant. Music Choice will respond only regarding Defensive Audits of its PSS service. Music Choice further objects to Interrogatory No. 2 as compound on the grounds that it comprises at least five separate interrogatories.

Subject to and without waiving its General Objections, Objections to Instructions and Definitions and Specific Objections to this Request, and solely as a good faith gesture to avoid unnecessary dispute, Music Choice responds as follows:

Music Choice has engaged independent auditors to perform defensive audits of its PSS royalty payments every year since 2008. These audits have always included payments for all transmissions within the scope of the PSS license. These auditors include recognized, public accounting firms such as BDO, Asher & Company Ltd, and Kreischer Miller – each of which satisfy the criteria of being independent and qualified under the regulations. While these firms have also been retained separately by Music Choice to perform its annual financial statement audits, it is important to note that Music Choice has never attempted to use those ordinary-course annual audits as its defensive audits. Instead, in each case, MC has entered into separate engagements with its independent auditors, with separate fees, for the specific purpose of auditing whether Music Choice paid the appropriate amount of royalties to SoundExchange as a PSS, in accordance with regulations. Each defensive audit has included a separate engagement letter detailing the scope of the audit, with the specific fees noted, along with a separate audit report detailing the audit findings.

More details relating to the remaining interrogatories subsumed within Interrogatory No. 2 may be found within documents being produced by Music Choice contemporaneously with these

Responses, which include Music Choice's engagement agreements with its independent auditors and invoices related to the defensive audits referenced above, along with the final audit reports.

See Bates Nos. Music Choice_Remand_0011047-133; 0012069-156; 0012291-292.

INTERROGATORY NO. 3:

Identify and describe in detail your service offerings that were in existence and making digital audio transmissions to the public over the internet on July 31, 1998. Please state the name of each internet service offering and the Distributor(s) through which subscribers could access the offering on July 31, 1998. For each offering and Distributor, please describe:

- a. The dates the offering was made available to subscribers;
- b. The number of channels of music programming;
- c. How subscribers could access the offering (*e.g.*, on mobile devices, through a distributor's portal, through a Music Choice website, etc.);
- d. The extent to which the offering was available outside the home;
- e. Any subscription or pricing options (*e.g.*, whether the offering was part of a bundle, whether offering was part of a basic or premium tier, any differences in price or content);
- f. Any functionality other than the ability to listen to linear music channels;
- g. The number of subscribers to whom the offering was available on July 31, 1998;
- h. The number of subscribers who actually used the offering in the month of July 1998;

Please note the extent to which the content or features of your offerings described above varied across categories (*e.g.*, bundle, tier of service, method of access).

RESPONSE TO INTERROGATORY NO. 3:

Music Choice objects to Interrogatory No. 3 as overbroad, unduly burdensome, and not proportional to the needs of the case to the extent it seeks information regarding service offerings other than Music Choice's PSS service. Service offerings by, *e.g.*, Music Choice's commercial music service – which is subject to a different statutory license and terms - are not relevant to this case. Music Choice further objects to Interrogatory No. 3 as overbroad, unduly burdensome and not proportional to the needs of the case to the extent it seeks the identification of the Distributors of Music Choice's service. The identification of each Distributor of Music

Choice's PSS in 1998 and the number of subscribers using or with access to the service is irrelevant to the issue to be determined in this remand proceeding, namely whether Music Choice's present day internet transmissions are eligible for the PSS rates and terms. Moreover, the Interrogatory seeks detailed information from twenty-five years ago, which is not only wildly burdensome but also more appropriate to document discovery. Moreover, to the extent Music Choice provides any substantive response based upon its reasonable search for such old information to date, it reserves the right to supplement its answers if additional information or detail is discovered. Music Choice further objects to Interrogatory No. 3 as compound on the grounds that it comprises at least eleven separate interrogatories. Music Choice further objects to Interrogatory No. 3 on the grounds that, due to the compound nature of Interrogatories Nos. 1 and 2, SoundExchange has already exceeded the five interrogatories allotted each Party in this proceeding under the operative discovery scheduling order.

Subject to and without waiving its General Objections, Objections to Instructions and Definitions and Specific Objections to this Request, and solely as a good faith gesture to avoid unnecessary dispute, Music Choice responds as follows:

Beginning approximately in mid-1996, as part of its unified product strategy for its consumer audio subscription service, Music Choice began streaming its audio channels to subscribers as part of their cable modem internet access plan with their cable providers. As of July 31, 1998 Music Choice was making its audio channels available to any of its Distributors as part of their consumer internet offerings to their individual subscribers. And by that date, Music Choice was actively transmitting the internet service through several Distributors, including Continental, Time Warner, Adelphia, MediaOne, Comcast, and Cox. Consumers who obtained their internet access through these Distributors were given access to Music Choice's

audio channels through their internet connection on connected devices such as personal computers.

Consumers receiving these transmissions would have a similar user experience listening to the Music Choice audio channels on their computers as on their TV. They were able to play the Music Choice channels as long as their connected device maintained its internet connection. There was no limitation based on the location of the device, and the service could be received from any device with an internet connection through the cable company's cable modem service. There was no additional charge to consumers to access the Music Choice audio channels via their internet connection. The service was bundled as part of the subscriber's cable television and/or internet access basic service. This was an early version of the "TV Everywhere" concept - which was part of Music Choice's business strategy back in 1998 - *e.g.*, the concept that a Distributor's authenticated basic cable subscribers could receive the same Music Choice audio channels available on the TV via that Distributor's internet offerings for no additional charge.

INTERROGATORY NO. 4.

Identify and describe in detail all of your service offerings that have been in existence and making digital audio transmissions to the public over the internet since January 1, 2018, as well as any such offerings that you expect to make through December 31, 2027. For each offering, please provide the information described in Interrogatory No. 3. You may limit your responses to service offerings you claim are eligible for a PSS Rate.

RESPONSE TO INTERROGATORY NO. 4:

Music Choice objects to Interrogatory No. 4 as vague to extent it refers to "any such offerings that you expect to make." For the purposes of its responses, Music Choice will interpret this phrase to mean any offerings Music Choice has concrete and imminent plans to make available as part of its PSS. Music Choice further objects to Interrogatory No. 4 as overbroad,

unduly burdensome and not proportional to the needs of the case to the extent it seeks detailed information about Music Choice's service offerings in narrative form. These requests for such detailed information is wildly burdensome and in any event more appropriate to document discovery. Music Choice further objects to Interrogatory No. 4 as compound on the grounds that it comprises at least 16 separate interrogatories. Music Choice further objects to Interrogatory No. 4 on the grounds that SoundExchange has exceeded the five interrogatories allotted each Party in this proceeding under the operative discovery scheduling order.

Subject to and without waiving its General Objections, Objections to Instructions and Definitions and Specific Objections to this Request, and solely as a good faith gesture to avoid unnecessary dispute, Music Choice responds as follows:

For many years the cable industry has treated streaming television content, both inside and outside the home, by authenticated cable subscribers as an integral part of an individual consumer's "residential" cable television service. During this period, MVPDs have been providing their consumers access to carried networks/channels, including Music Choice, on internet-connected devices both inside and outside the home at no additional charge as part of "TV Everywhere." As of January 1, 2018 through today, Music Choice has been making all of its audio channels available to authenticated basic cable and other video programming subscribers via the internet through smartphones, computers, tablets and other connected/mobile devices for no separate charge. Subscribers access these internet transmissions via Music Choice's proprietary applications and website interface or via a Distributor's own applications and website interfaces. Music Choice's affiliation agreements with Distributors obligate Music Choice to provide this TV Everywhere access as part of the same consumer audio service the subscriber receives on the TV, as part of the subscriber's basic cable or other video programming subscription and without any separate or additional

charge. Since 2018, a consumer accessing Music Choice’s audio channels on the TV through Music Choice’s enhanced TV interface (ETV) would have access to all of the same audio channels, both in and outside the home, as a consumer would have through Music Choice’s applications on their connected devices (e.g., smartphones), with the same “look and feel” including in terms of user interface, onscreen content and functionality. Music Choice’s television, app and website offerings are all part of the same, single unitary service.

Music Choice’s current Internet transmissions are an extension of the internet transmissions Music Choice was making as of 1998. While Music Choice has continued to make new investments and improvements related to its internet transmissions over the course of 25 years, the same is true for the TV-based component of the Music Choice service. As noted, making Music Choice’s audio channels available on a TV Everywhere basis is a key part of the cable consumer experience demanded by the company’s Distributors.

INTERROGATORY NO. 5:

Identify and state every piece of evidence that supports your contention some or all of Music Choice’s transmissions over the internet during the period 2018-2027 qualify for a PSS Rate.

RESPONSE TO INTERROGATORY NO. 5:

Music Choice objects to Interrogatory No. 5 as overbroad, non-specific, and unduly burdensome to the extent it seeks the identification of “every piece of evidence.” Music Choice further objects to Interrogatory No. 5 to the extent it seeks information that is covered by the attorney client privilege, work product privilege, or any other privilege or immunity. Music Choice further objects to Interrogatory No. 5 on the grounds that SoundExchange has exceeded the five interrogatories allotted each Party in this proceeding, pursuant to the operative discovery scheduling order.

Subject to and without waiving its General Objections, Objections to Instructions and Definitions and Specific Objections to this Request, Music Choice responds as follows:

Music Choice will stand on its objections and will not respond to Interrogatory No. 5.

Dated: March 31, 2021

Respectfully submitted,

/s/ Paul M. Fakler

Paul M. Fakler (NY Bar No. 2940435)

Margaret Wheeler-Frothingham (NY Bar No. 5281191)

MAYER BROWN LLP

1221 Avenue of the Americas

New York, NY 10020-1001

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Facsimile: (212) 849-5549

PFakler@mayerbrown.com

MWheelerFrothingham@mayerbrown.com

Counsel for Music Choice

Exhibit J

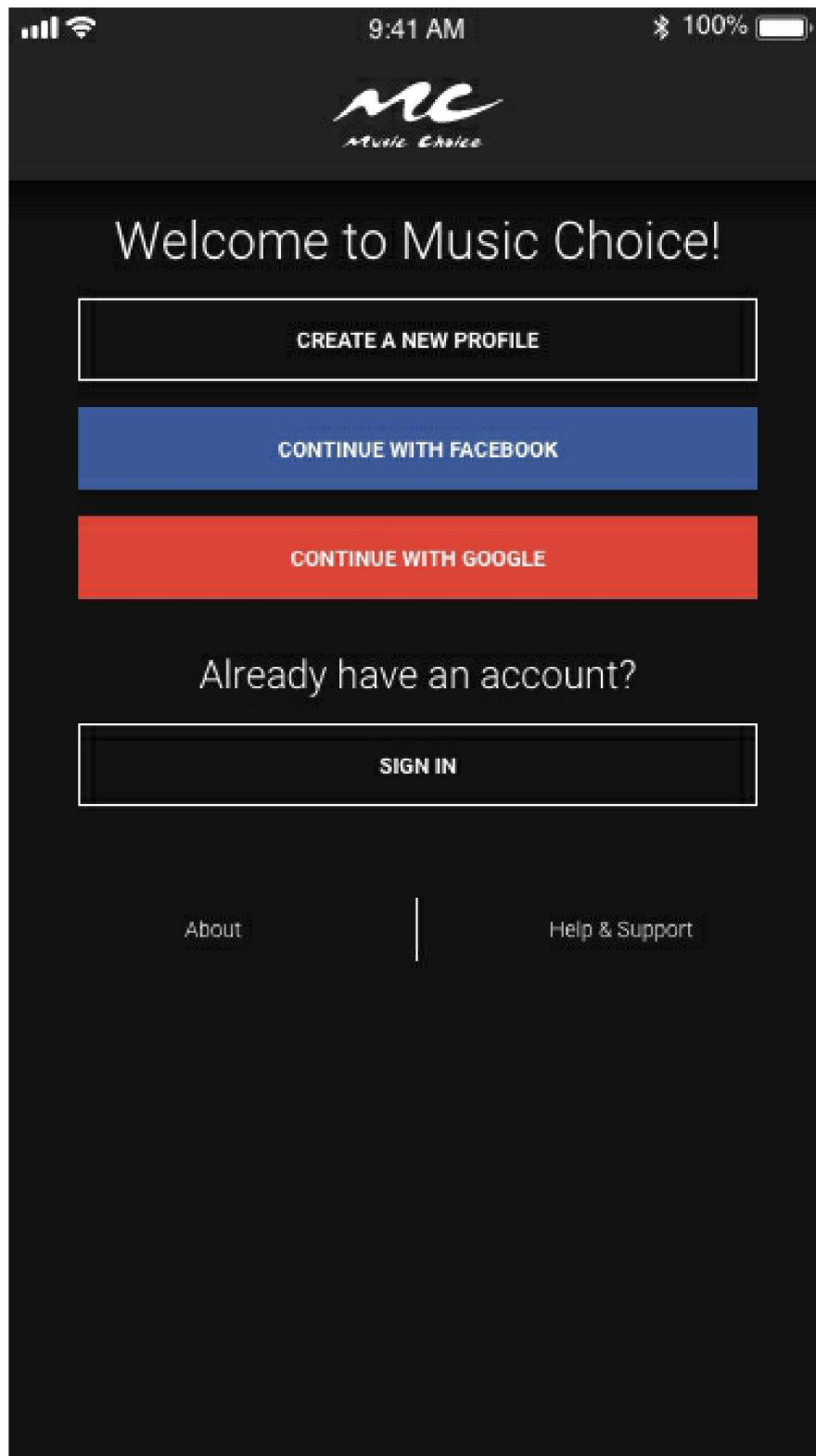


Exhibit K

**RESTRICTED – Subject to Protective Order
in Docket No. 16-CRB-0001 – SR/PSSR
(2018-2022) (Remand)**

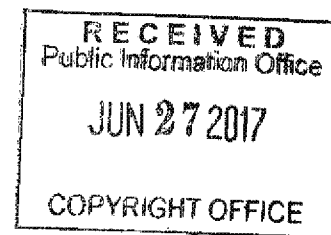
Exhibit L

**RESTRICTED – Subject to Protective Order
in Docket No. 16-CRB-0001 – SR/PSSR
(2018-2022) (Remand)**

Exhibit M



733 10th Street, NW | 10th Floor | Washington, DC 20001
P: 202.640.5858 | F: 202.640.5859 | SoundExchange.com



June 27, 2017

BY HAND

Copyright Royalty Board
Library of Congress
James Madison Memorial Building
101 Independence Ave., SE
Washington, D.C. 20559-6000

Re: Notice of Intent to Audit Music Choice for CY 2016

To Whom It May Concern:

SoundExchange is the sole collective designated by the Copyright Royalty Board (hereinafter, "the Board") to collect and distribute the statutory royalties paid by Preexisting Subscription Services and Business Establishment Services. See 37 C.F.R. §§ 382.2 and 384.4(b)(1)¹. SoundExchange hereby notifies the Board of its intent to audit Music Choice's Preexisting Subscription Service and Business Establishment Service. See 37 C.F.R. §§ 382.6(c), and 384.6(c).

Pursuant to applicable regulations, SoundExchange intends to audit Music Choice's services for the year 2016 for its transmissions terminating in the U.S. See 37 C.F.R. § 384.6(b) ("[SoundExchange] may conduct a single audit of a Licensee...during any given calendar year, for *any or all of the prior 3 calendar years*") (emphasis supplied). Although the regulations governing Preexisting Subscription Services do not limit the years that may be subject to audit, see 37 C.F.R. § 382.6(b), there is no reason to believe that the year 2016 would not be within the permissible scope of an audit that is commenced via this notice.

The audit shall be conducted by EisnerAmper LLP, located at 750 Third Avenue, New York, NY 10017.

Pursuant to 37 C.F.R. §§ 382.6(c), and 384.6(c), a copy of this Notice of Intent to Audit is being served contemporaneously upon Music Choice.

¹ Citations are to the regulations in effect for the period of the audit.

Sincerely,

A handwritten signature in black ink, appearing to read "Brienne Jackson", written in a cursive style.

Brienne Jackson
Senior Counsel, Licensing and Enforcement

cc: Paula Calhoun, EVP & General Counsel, Music Choice (by FedEx)
Jenn Compton, Manager, Accounting, Music Choice (by FedEx)

Exhibit N



733 10th Street, NW | 10th Floor | Washington, DC 20001
P: 202.640.5858 | F: 202.640.5859 | SoundExchange.com

June 27, 2017

BY HAND

Copyright Royalty Board

Library of Congress

James Madison Memorial Building

101 Independence Ave., SE

Washington, D.C. 20559-6000

Re: Notice of Intent to Audit Music Choice for CY 2016

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Pursuant to applicable regulations, SoundExchange intends to audit Music Choice’s services for the year 2016 for its transmissions terminating in the U.S. See 37 C.F.R. § 384.6(b)

¹ Citations are to the regulations in effect for the period of the audit.

("[SoundExchange] may conduct a single audit of a Licensee...during any given calendar year, for *any or all of the prior 3 calendar years*") (emphasis supplied). Although the regulations governing Preexisting Subscription Services do not limit the years that may be subject to audit, see 37 C.F.R. § 382.6(b), there is no reason to believe that the year 2016 would not be within the permissible scope of an audit that is commenced via this notice.

The audit shall be conducted by EisnerAmper LLP, located at 750 Third Avenue, New York, NY 10017.

Pursuant to 37 C.F.R. §§ 382.6(c), and 384.6(c), a copy of this Notice of Intent to Audit is being served contemporaneously upon Music Choice.

Sincerely,

/s/ Brienne Jackson

Brienne Jackson

Senior Counsel, Licensing and Enforcement

cc: Paula Calhoun, EVP & General Counsel, Music Choice (by FedEx)

Jenn Compton, Manager, Accounting, Music Choice (by FedEx)

SoundExchange's Notice of Intent to Audit Music Choice for CY 2016

SXREMAND000000141

Exhibit O

**RESTRICTED – Subject to Protective Order
in Docket No. 16-CRB-0001 – SR/PSSR
(2018-2022) (Remand)**

Exhibit P

**RESTRICTED – Subject to Protective Order
in Docket No. 16-CRB-0001 – SR/PSSR
(2018-2022) (Remand)**

Exhibit Q

**RESTRICTED – Subject to Protective Order
in Docket No. 16-CRB-0001 – SR/PSSR
(2018-2022) (Remand)**

Exhibit R

**RESTRICTED – Subject to Protective Order
in Docket No. 16-CRB-0001 – SR/PSSR
(2018-2022) (Remand)**

Exhibit S

**RESTRICTED – Subject to Protective Order
in Docket No. 16-CRB-0001 – SR/PSSR
(2018-2022) (Remand)**

Proof of Delivery

I hereby certify that on Wednesday, June 30, 2021, I provided a true and correct copy of the SoundExchange, Inc.'s Opening Brief on Remand to the following:

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Music Choice, represented by Paul M Fakler, served via ESERVICE at pfakler@orrick.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Signed: /s/ Emily Chapuis